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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. LOUIS RAY WATSON, Defendant and Appellant.	A098183 (Alameda County Super. Ct. No. 141237)

This case questions the constitutionality and application of Evidence Code section 1380,[1] a provision adopted in 1999 to facilitate the introduction of hearsay statements by the victims of various forms of elder abuse. In the published portion of this opinion, we conclude that section 1380 meets constitutional standards, but that in this case the prosecution failed to lay an adequate foundation for the admission of videotaped testimony of one of the victims that was received under its authority. Although the trial court properly found that the elderly declarant was competent to testify at the time he gave his statement, competency is not a sufficient indication of trustworthiness to justify admission of the statement.

Defendant also challenges the sufficiency of the evidence to establish the violation of the elder abuse statute, Penal Code section 368, with respect to three other victims, and asserts other errors concerning the conduct of his trial. In the unpublished portion of this opinion, we reject these contentions. Therefore, we reverse defendant's conviction on the

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts 2, 3, 4, and 5 of the DISCUSSION.

[1] All statutory references are to the Evidence Code unless otherwise noted.

counts to which the videotape related, but uphold the convictions on counts involving the three other victims.

FACTUAL AND PROCEDURAL CONTEXT

Defendant Louis Watson was charged by a second amended information with four counts of theft from an elder (Pen. Code, § 368, subd. (d)), eight counts of first degree residential burglary (Pen. Code, § 459), and two counts of diversion of construction funds (Pen. Code, § 484, subd. (b)). The information also alleged that defendant had suffered eight prior convictions, one prior prison term, and one prior strike (Pen. Code, §§ 667, 667.5).

The charges against defendant arose out of home improvement projects that defendant contracted to perform for four elderly homeowners. Defendant was accused of taking money from these elderly victims by means of false pretenses and misrepresentations, and of entering their homes with the intent to commit theft by false pretenses. The jury convicted defendant on all four counts of theft and on six of the burglary counts. The jury acquitted defendant on one count of burglary, and the other count was dismissed by the court on a motion by defendant under Penal Code section 1118.1. The trial court also dismissed the two counts of diversion of construction funds. The trial court found true the allegations that defendant has suffered eight prior convictions, including a strike conviction, and one prior prison term. The court sentenced defendant to 24 years 4 months in prison. Defendant filed a timely notice of appeal.

DISCUSSION

Defendant was convicted of one count of theft by false pretenses from an elderly person under Penal Code section 368, subdivision (d) against each of four complainants. "A theft conviction on the theory of false pretenses requires proof that (1) the defendant made a false pretense or representation to the owner of property; (2) with the intent to defraud the owner of that property; and (3) the owner transferred the property to the defendant in reliance on the representation. [Citations.] In this context, reliance means that the false representation 'materially influenced' the owner's decision to part with his property; it need not be the sole factor motivating the transfer. [Citation.] . . . Reliance

may be inferred from all the circumstances." (*People v. Wooten* (1996) 44 Cal.App.4th 1834, 1842-1843.) Defendant was also convicted of six counts of burglary under Penal Code section 459 for having entered the victims' homes with the intent to commit theft by false pretenses.

1. *Evidence Code section 1380 does not violate the Confrontation Clause of the United States Constitution, but was applied erroneously to admit the videotape testimony of Thomas Means.*

A. Section 1380 is not unconstitutional on its face.

Defendant was convicted in count three of theft by false pretenses from Thomas Means, and in counts four through six with the burglary of Means's home on or about March 23, March 24, and March 29, 2002. Means was unable to testify at trial because he was suffering from advanced stages of dementia. Over defendant's objection, a videotape of statements made by Means in response to the questions of an investigator from the district attorney's office approximately one year prior to trial was admitted into evidence under section 1380. The videotape provided the only narrative of the dealings that took place between the defendant and Means.[2]

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[2] In the tape, Means explained that he hired defendant to build a new fence and to do odd jobs around the house. Initially, Means stated that he believed the original estimate for the new fence was approximately $1,100. Later, however, he changed the figure to $1,200 and then again to $500 or $600. Means testified that it did not take defendant too long to build the fence, and that defendant did good work on the fence. After building the fence, defendant asked to be paid. Means explained what happened as follows: "He went to work, started doing the, finish I don't know how many days, it wasn't too long. Then, he started uh, talking about the money, he wanted to be paid. So I asked, I got out my check book and I asked him how much? I already knew, I thought . . . . I forgotten how much, but uh, real, real reasonable, I knew it was five or six hundred dollars. And uh, so I asked for the amount, it was over a thousand and I questioned him, and he said, 'Well, the first figure I gave you was uh, materials.[] And then when, when I gave you the estimate it was for labor and overhead.["] And I said "I thought the figure you gave me was for the fence." "Oh, no, no, no," he said. And I argued with him, and I think I got it down maybe fifty dollars, but right then I started to be a little more careful [unintelligible] anyway he did nice work. So I had him do some more stuff and his prices was cheaper and he gave me the total figure was, when he gave me the estimate. I didn't think it was too smart to uh, get [unintelligible]. Most of this stuff, a lot of it anyway was my stupidity, I went to college and took four years of engineering, so I didn't think it was too bright." Means also testified that although he had signed a check that bore the notation "tree job," he did not get a written estimate for tree trimming, and he did not remember having defendant trim his trees. Moreover, he did

Section 1380 provides that a statement of an unavailable victim of alleged elder abuse is admissible in a prosecution under Penal Code section 368 if the statement was videotaped by a law enforcement official prior to the death or disabling of the victim, who must have been at least 65 years of age or a dependent adult when the violation occurred. Other evidence must corroborate the statement, and there must be no evidence that the prosecution was responsible for the unavailability of the witness. Additionally, the statement is admissible only if "[t]he party offering the statement has made a showing of particularized guarantees of trustworthiness regarding the statement, the statement was made under circumstances which indicate its trustworthiness, and the statement was not the result of promise, inducement, threat, or coercion." (§ 1380, subd. (a)(1).)[3] "The Legislature has found that there is a significant need for this hearsay exception and "that

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not remember that he had any trees. Finally, Means said that he guessed he wrote defendant over thirty checks because defendant had done work for him, but he could not remember writing at least four checks totaling $5,900 and he could not remember what specifically they were for. For many of the checks, Means identified his signature as being in his handwriting, but he did not believe the payee line or the dollar amount was written by him.

[3] Section 1380 reads in relevant part as follows: "(a) In a criminal proceeding charging a violation, or attempted violation, of section 368 of the Penal Code, evidence of a statement made by a declarant is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness, as defined in subdivisions (a) and (b) of section 240, and all of the following are true: [¶] (1) The party offering the statement has made a showing of particularized guarantees of trustworthiness regarding the statement, the statement was made under circumstances which indicate its trustworthiness, and the statement was not the result of promise, inducement, threat, or coercion. In making its determination, the court may consider only the circumstances that surround the making of the statement and that render the declarant particularly worthy of belief. [¶] (2) There is no evidence that the unavailability of the declarant was caused by, aided by, solicited by, or procured on behalf of, the party who is offering the statement. [¶] (3) The entire statement has been memorialized in a videotape recording made by a law enforcement official, prior to the death or disabling of the declarant. [¶] (4) The statement was made by the victim of the alleged violation. [¶] (5) The statement is supported by corroborative evidence. [¶] (6) The victim of the alleged violation is an individual who meets both of the following requirements: [¶] (A) Was 65 years of age or older or was a dependent adult when the alleged violation or attempted violation occurred. [¶] (B) At the time of any criminal proceeding, including, but not limited to, a preliminary hearing or trial, regarding the alleged violation or attempted violation, is either deceased or suffers from the infirmities of aging as manifested by advanced age or organic brain damage, or other physical, mental, or emotional dysfunction, to the extent that the ability of the person to provide adequately for the person's own care or protection is impaired."

crimes against elders and dependent adults are deserving of special consideration and protection, not unlike the special protections provided for minor children, because elders and dependent adults may be confused, on various medications, mentally or physically impaired, or incompetent, and therefore less able to protect themselves, to understand or report criminal conduct, or to testify in court proceedings on their own behalf." (Pen. Code, § 368; see also *In re Cindy L.* (1997) 17 Cal.4th 15, 28 [appropriate to "create hearsay exceptions for classes of evidence for which there is a substantial need, and which possess an intrinsic reliability that enable them to surmount constitutional and other objections that generally apply to hearsay evidence"].) However, as the Supreme Court emphasized in *In re Cindy L, supra,* "Even if hearsay evidence is necessary, . . . an exception to the hearsay rule is not valid unless the class of hearsay evidence proposed for admission is inherently reliable." (*Ibid.*)

Florida, Delaware, Oregon, and Illinois have adopted similar elder abuse hearsay exceptions. (Fla. Stat. Ann. § 90.803(24); Del. Code Ann. tit. 11, § 3516[4]; Or. Stat. § 40.460, subd. (18)(b)[5]; 725 Ill. Comp. Stat. Ann. 5/115-10.3.)[6] However, the Florida

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[4] Delaware's hearsay exception applies to the out-of-court statements of infirm adults and patients and residents of a state facility. Infirm is defined as an adult who is substantially impaired to provide adequately for his or her own care and custody. (See Del. Code Ann. tit. 11, § 3902.) The statute does not require that the statement be videotaped by a law enforcement officer.

[5] The Oregon statute provides that a statement made by a victim of elder abuse "may be admitted in evidence only if the proponent establishes that the time, content and circumstances of the statement provide indicia of reliability, and in a criminal trial that there is corroborative evidence of the act of abuse and of the alleged perpetrator's opportunity to participate in the conduct and that the statement possesses indicia of reliability as is constitutionally required to be admitted."

[6] Commentators have urged the adoption of similar statutes in additional states. (See Hatch, *Great Expectations—Flawed Implementation: The Dilemma Surrounding Vulnerable Adult Protection* (2002) 29 Wm. Mitchell L.Rev 9, 41-42 ["It is a travesty of justice when perpetrators of criminal vulnerable adult maltreatment cannot be held accountable for their criminal conduct due to the very vulnerabilities that make their victims the targets of such acts. . . . There should be an exception to the hearsay rule that allows the out-of-court statements of vulnerable adult crime victims to be admitted as substantive evidence under certain circumstances, including when the vulnerable adult is unavailable as a witness. Some states have already enacted such a

Supreme Court has invalidated the Florida statute under the Confrontation Clause of the Sixth Amendment to the United States Constitution (*Conner v. State* (Fla. 1999) 748 So.2d 950 (*Conner*)), and defendant asserts that the California statute should be invalidated on the same ground. One reported California decision has upheld the admission of evidence under section 1380 after concluding that there was no violation of constitutional standards, but the opinion contains no mention of the decision of the Florida Supreme Court. (*People v. Tatum* (2003) 108 Cal.App.4th 288, 295-296, 300 (*Tatum*).)

In *Idaho v. Wright* (1990) 497 U.S. 805, 814, the United States Supreme Court reaffirmed that "[t]he Confrontation Clause . . . bars the admission of some evidence that would otherwise be admissible under an exception to the hearsay rule." When a witness is shown to be unavailable, " 'his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded at least absent a showing of particularized guarantees of trustworthiness.' " (*Id.* at pp. 814-815.) Referring to its earlier decision in *Ohio v. Roberts* (1980) 448 U.S. 63, the court reiterated "that the 'indicia of reliability' requirement could be met in either of two circumstances: where the hearsay statement 'falls within a firmly rooted hearsay exception,' or where it is supported by 'a showing of particularized guarantees of trustworthiness.' " (*Idaho v. Wright, supra,* at p. 816.) These particularized guarantees "must be shown from the totality of the circumstances, but . . . the relevant circumstances include only those that surround the making of the statement and that render the declarant particularly worthy of belief." (*Id.* at p. 819.) "[I]f the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility, then the hearsay rule does not bar admission of the statement at trial." (*Id.* at p. 820.) To be admissible under the constitutional standard, the evidence "must

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hearsay exception, and Minnesota should follow suit to ensure that perpetrators of vulnerable adult crimes are brought to justice."].)

similarly be so trustworthy that adversarial testing would add little to its reliability." (*Id.* at p. 821.) "[U]nless an affirmative reason, arising from the circumstances in which the statement was made, provides a basis for rebutting the presumption that a hearsay statement is not worthy of reliance at trial, the Confrontation Clause requires exclusion of the out-of-court statement." (*Ibid.*.) In *Idaho v. Wright*, a sexual abuse case, the Supreme Court held that the Confrontation Clause required exclusion of hearsay statements of a child that had been admitted under Idaho's residual hearsay exception. The court rejected the argument that the reliability of the hearsay statement could be established by other corroborating evidence (*id.* at p. 822), and it also rejected the view that the absence of certain procedural safeguards, such as the failure to videotape the statements and asking leading questions with preconceived ideas of what the answers should be, was dispositive (*id.* at p. 818). The court found in the child's statements "no special reason for supposing that the incriminating statements were particularly trustworthy" sufficient to overcome "the presumptive unreliability of the out-of-court statements." (*Id.* at p. 826.) Nonetheless, the Supreme Court did not invalidate Idaho's statutory residual hearsay exception, and emphasized that "we have in any event held that the Confrontation Clause does not erect a *per se* rule barring the admission of prior statements of a declarant who is unable to communicate to the jury at the time of trial." (*Id.* at p. 825.)

In *Conner*, the Supreme Court of Florida compared Florida's statute to a similar exception for child victims of physical or sexual abuse which that court had previously upheld, but found that distinctions between the two statutes were constitutionally significant. (748 So.2d at pp. 957-958.) First, the Florida court found that the statute pertaining to the elderly encompassed a potentially greater number of people—adults over 60 versus children under 11—and a broader number of crimes—" 'any act of abuse or neglect, any act of exploitation, the offense of battery or aggravated battery or assault or aggravated assault or sexual battery, or any other violent act" versus "child abuse, child neglect or sexual abuse." (*Id*. at p. 958) "Thus," the court observed, "the elderly hearsay exception would be broadly applicable to a wide variety of crimes and is not

restricted to the elder abuse context." (*Ibid.*) Second, the court concluded that the factors listed in the statute[7] were not likely to ensure the reliability of the statements, and the court felt that it was "unable to formulate a list of permissible considerations that would ensure the reliability of a hearsay statement made by an elderly adult to the extent that 'adversarial testing would add little to its reliability.' [Citation.] The circumstances that might necessitate the use of the statement—such as the mental infirmity or physical infirmity of the elderly person—would be the very circumstances that would render the statement less reliable." (*Id*. at pp. 958-959.)

We need not give extended consideration to whether there are differences between the provisions of the Florida and California statutes that might justify differing conclusions as to the validity of the two because, with all respect, we are not persuaded by the reasoning of the Florida court.[8] Initially, we do not believe that the potential scope

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[7] The Florida statute requires the trial court to find "that the time, content, and circumstances of the statement provide sufficient safeguards of reliability." The statute further provides, "In making its determination, the court may consider the mental and physical age and maturity of the elderly person or disabled adult, the nature and duration of the abuse or offense, the relationship of the victim to the offender, the reliability of the assertion, the reliability of the elderly person or disabled adult, and any other factor deemed appropriate."

[8] We are not alone in our disagreement with the reasoning of the Florida Supreme Court in this respect. (See Schulmen, *The Florida Supreme Court vs. The United States Supreme Court: The Florida Decision in Conner v. State and the Federal Interpretation of Confrontation and Federal Rule of Evidence 807* (2001) 55 U. Miami L.Rev. 583, 597 ["[T]he Florida Supreme Court either misconstrues the United States Supreme Court's hearsay exception jurisprudence, or interprets confrontation differently than the United States Supreme Court intended."]; Ehrhardt, *When Children and the Elderly Are Victims: Balancing the Rights of the Accused Against Those of the Victim* (2001) 55 U. Miami L.Rev. 645, 653-654.) In the latter article, the author writes that the *Conner* court was particularly concerned with its inability to compile a "list" of factors that could be applied by the trial courts in determining reliability (Ehrhardt, *supra*, 55 U. Miami L.Rev. at p. 654) and points out that the Florida Supreme Court in *Perez v. State* (Fla. 1988) 536 So.2d 206 "rejected a requirement for such a list as did the United States Supreme Court in [*Idaho v. Wright*]. . . . Both *Wright* and *Perez* recognized that it is not possible to have an exhaustive list of factors applicable to all abuse cases, since each out-of-court statement will present varying elements of time, place, and circumstances." Nonetheless, Ehrhardt notes that "there appear to be factors that can ensure the necessary particularized guarantees of trustworthiness for statements offered under [the Florida statute]," recognizing that many of the same factors which have been deemed to be relevant in determining reliability under the child abuse exception would

of the exception is the measure of its constitutionality. Residual exceptions to the hearsay rule that potentially apply in far more situations have been widely upheld, by the United States Supreme Court and by many other courts. (See, e.g., *Idaho v. Wright, supra*, 497 U.S. at pp. 817-818; *State v. Sharpe* (Conn. 1985) 491 A.2d 345, 353-354; *State v. McCafferty* (S.D. 1984) 356 N.W.2d 159, 162-163.) More importantly, we disagree that it is not possible to articulate relevant factors to determine whether hearsay satisfying the other criteria of section 1380 is trustworthy. There are numerous sources to which the courts may turn for guidance in developing the relevant factors.

Although section 1380 does not provide a list of relevant factors,[9] California courts can reasonably rely on factors drawn from case law addressing the trustworthiness of hearsay in other circumstances. (See *Idaho v. Wright, supra*, 497 U.S. at pp. 820-822, citing *State v. Robinson* (Ariz. 1987) 735 P.2d 801, 811 [spontaneity and consistent repetition]; *Morgan v. Foretich* (4th Cir. 1988) 846 F.2d 941, 948 [mental state of the declarant]; *State v. Kuone* (Kan. 1988) 757 P.2d 289, 292-293 [lack of motive to fabricate].) In *Idaho v. Wright*, the court discussed the elements that justify the admission of hearsay statements under three "firmly rooted" hearsay exceptions. "The basis for the 'excited utterance' exception, for example, is that such statements are given under circumstances that eliminate the possibility of fabrication, coaching, or confabulation, and that therefore the circumstances surrounding the making of the statement provide sufficient assurance that the statement is trustworthy and that cross-examination would be superfluous. [Citations.] Likewise, the 'dying declaration' and 'medical treatment' exceptions to the hearsay rule are based on the belief that persons

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also be relevant to the reliability of a statement offered under the elder abuse exception. (Ehrhardt, *supra*, 55 U. Miami L.Rev. at p. 654.)

[9] The Delaware and Oregon statutes provide lists of factors for the court to consider when determining the trustworthiness of an out-of-court statement. (Del. Code Ann. tit. 11, § 3516; Or. Stat. § 40.460, subdivision (18)(b)(A) to (K).) Some of the enumerated factors weigh in favor of a finding of reliability, while others tend to suggest unreliability. The significance of some of the factors must be tempered by the reasoning in *Idaho v. Wright* which, for example, precludes reliance on corroborative evidence to support the trustworthiness of the hearsay statement in question.

making such statements are highly unlikely to lie. See, *e.g.,* [*Mattox v. U.S.* (1895) 156 U.S. 237, 244] ('[T]he sense of impending death is presumed to remove all temptation to falsehood, and to enforce as strict an adherence to the truth as would the obligation of oath'); *Queen v. Osman,* 15 Cox Crim. Cas. 1, 3 (Eng. N. Wales Cir.1881) (Lush, L.J.) ('[N]o person, who is immediately going into the presence of his Maker, will do so with a lie upon his lips'); [citation].)" (*Idaho v. Wright, supra,* 497 U.S. at p. 820.) Likewise, in *United States v. Bailey* (3rd Cir. 1978) 581 F.2d 341, 348-349, the court noted that when hearsay statements are admitted under traditional exceptions it is "because the circumstances in which the statements are made are indicative of a strong propensity for truthfulness (dying declarations), because there has been a previous opportunity for cross-examination (former testimony), or because the contents of the statements themselves are of such a nature that one reasonably would conclude that the speaker was telling the truth (statements against interest, statements of family history)."

Factors for determining trustworthiness under section 1380 also can be drawn from the circumstances that justify the admissibility of hearsay statements under other nontraditional hearsay exceptions. Indicia of reliability identified in cases under the federal residual hearsay exception[10] include whether the declarant had an incentive to speak truthfully or falsely; the relative contemporaneousness of the statement; the presence of oath or cross-examination; and the amount of time between the event and the declaration. (*United States v. Bailey, supra*, 581 F.2d at p. 348; *United States v. Vretta* (7th Cir. 1986) 790 F.2d 651, 659; *United States v. Van Lufkins* (8th Cir. 1982) 676 F.2d

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[10] Federal Rules of Evidence, rule 807 provides: "A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant."

1189, 1192.) The requirements to ensure the reliability of child hearsay under both statutory (§ 1360) and judicially created hearsay exceptions in California include those recommended by the American Bar Association and adopted in Washington: in addition to other safeguards, the court must find that "the time, content and circumstances of the statement" provide sufficient indicia of reliability. (*In re Cindy L, supra*, 17 Cal.4th at p. 29.) Potentially relevant factors bearing on the reliability of hearsay statements made by a child victim of abuse include possible suggestiveness created by leading questions; whether the victim's statement is clear and unambiguous; and whether any other event occurred between the time of the abuse and the time of the statement which could account for the contents of the statement. (See *People v. District Court of El Paso County* (Colo. 1989) 776 P.2d 1083; *Norris v. State* (Tex.App.1990) 788 S.W.2d 65.)

The single California case applying section 1380 illustrates how factors drawn from the large body of law establishing criteria for assessing the trustworthiness of hearsay statements may be utilized to ensure compliance with constitutional standards. (*People v. Tatum, supra,* 108 Cal.App.4th 288.) In that case, the Court of Appeal upheld the admission of the videotaped statement of an elderly victim, Smith, under section 1380 because the circumstances surrounding the making of the statement demonstrated that the statement was trustworthy. The defendant, Smith's caretaker, was convicted of attempted murder and assault with a deadly weapon in addition to infliction of injury on a dependent elder in violation of Penal Code section 368, subdivision (b)(1). Less than one month after the attack that hospitalized Smith, an investigator interviewed him at his nursing home and videotaped the entire interview. Although Smith "was confused about some matters, . . . [he] maintained that it was appellant who attacked him with a hammer." (*People v. Tatum, supra,* at p. 293.) Because Smith died prior to the trial, the videotaped statement was shown to the jury. In affirming the receipt of the videotaped testimony, the Court of Appeal agreed with the trial court "that the circumstances surrounding the making of the statement rendered Smith unlikely to lie. There is no evidence tending to show that Smith would lie or had a motive to lie about the attack upon him, and he had nothing to gain by lying about the attack or the identity of the

attacker. In fact, falsely accusing appellant would be contrary to Smith's self interest, much in the same way a person seeking medical treatment would be acting against his own self-interest by lying to his doctor. Appellant was a caretaker of Smith and his wife. He was of great personal assistance to Smith and Mrs. Smith. Falsely implicating appellant to cause appellant to be charged with the attack would have left Smith without full-time care upon his release from the nursing home, and would have deprived Mrs. Smith of appellant's services." (*People v. Tatum, supra,* at pp. 296-297.)

We are in complete agreement with the decision in *Tatum*, and believe that it both illustrates the type of showing that may establish the trustworthiness of a hearsay statement offered under section 1380 and demonstrates the possibility of applying the statute without violating the constitutionally protected right of confrontation. Accordingly, we reject the contention that section 1380 is unconstitutional on its face.

B. The trial court erred in finding that Means's competency to testify provided a particularized guarantee of trustworthiness.

Although section 1380 satisfies constitutional standards, Means's videotaped testimony was admissible under the statute only if "[t]he party offering the statement has made a showing of particularized guarantees of trustworthiness regarding the statement" and "the statement was made under circumstances which indicate its trustworthiness." Here, the prosecution failed to make the showing required by the statute and by Sixth Amendment standards.

Under both section 1380 and *Idaho v. Wright*, the burden was on the prosecutor to rebut the presumption that Means's statements were untrustworthy by demonstrating that "the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility." (497 U.S. at p. 820.) The prosecutor must offer an "affirmative reason, arising from the circumstances in which the statement was made [that] provides a basis for rebutting the presumption that a hearsay statement is not worthy of reliance at trial." (*Id.* at p. 821.) Here, despite testimony that Means suffered from dementia at the time his statements were tape recorded, the prosecutor contended that he was then competent to testify in that he had the capacity to perceive

and recollect and was able to articulate facts so as to be understood. The trial court agreed: "Let me say for the record that after the testimony of Dr. Iliff on Thursday afternoon, I was very dubious about the—whether or not the statement given in December 2000 had sufficient indicia of trustworthiness, but based upon my concerns after Dr. Iliff's testimony I did go home and review it and I was astonished at what I thought was the cogency of Mr. Means in that statement . . . . It was clear. He was oriented. He knew where he was. He knew his birthdate. . . . He had some problems with short-term memory but certainly nothing parallel to his testimony of a few days ago." We too have reviewed the videotape and share the trial court's reaction. Although confused about some matters, Means was generally coherent, and he gave every appearance of being truthful.

Nonetheless, the finding that Means was competent when he made the statement fails to satisfy the prosecutor's burden. A declarant's competency to testify is not a sufficient guarantee of trustworthiness. While a declarant's lack of competency, or inability to "express himself concerning the matter so as to be understood" (§ 701, subd. (a)(1)) at the time he or she made the statement, tends to negate a declarant's trustworthiness, the converse is not necessarily true. (See *Idaho v. Wright*, *supra*, 497 U.S. at p. 825.) That a witness is capable of being understood and telling the truth does not provide any assurance that he or she is telling the truth. What is significant is " 'not the competency of the witness' but 'the particularized guarantees of trustworthiness that ensure the reliability of a statement.' " (*In re Cindy L., supra,* 17 Cal.4th at p. 34.) As our Supreme Court quoted approvingly from a decision of the Washington Supreme Court with respect to the hearsay statement of a child, " 'Reliability does not depend on whether the child is competent to take the witness stand, but whether the comments and circumstances surrounding the statement indicate it is reliable. . . .' " (*Ibid.*)

Here, the prosecutor failed to make any showing beyond competency. On appeal, the Attorney General argues that "there is nothing that indicates that Mr. Means was lying or had any motive to fabricate." The Attorney General's conclusory statement is insufficient. The prosecutor must affirmatively rebut the presumption of

untrustworthiness. (*Idaho v. Wright, supra,* 497 U.S. at p. 821.) The showing must be based on the "circumstances that surround the making of the statement and that render the declarant particularly worthy of belief." (*Id.* at p. 820.) More is required than the perception from viewing the videotape that the witness seems credible and does not appear to be testifying falsely. While we note that in the main the questions put to Means during the interview were not leading and agree that there are no indications on the tape that he was lying, it cannot be said that he was without any motive to stretch or twist the facts. At a minimum, Means paid a significant amount for substandard work. Animosity, resentment or a desire to shift responsibility to the other party would not be unusual under such circumstances, and a criminal conviction might give rise to restitution. Indeed, as part of defendant's sentence he was ordered to make restitution to Means in the amount of $14,475. These circumstances surrounding the making of the statements that were videotaped hardly provide assurance of their trustworthiness. Neither the prosecutor, the Attorney General nor the trial judge pointed to any other circumstances indicating that Means's recitation of events that occurred eight months earlier was necessarily accurate, or that cross-examination was not likely to have been of value.

The contrast between the circumstances in *Tatum* and those here underscores the insufficiency of the showing in this case. In *Tatum*, the victim's recorded statement was taken within a month of the incident and merely corroborated other evidence that the defendant was the person who struck him. The fact that the defendant was the victim's caregiver who he considered a friend and on whom he and his wife were dependent provided assurance that the victim was unlikely to lie. Not only did the victim have nothing to gain from falsely identifying the defendant as his assailant, but doing so would have been contrary to his own best interest. Thus, the circumstances provided much the same assurance of reliability as supports the firmly rooted hearsay exception for declarations against one's own interest. (§ 1230.) Here, in contrast, the surrounding circumstances provided no such indicia of reliability. The relationship between defendant and Means provided no disincentive for Means to testify falsely and, to the contrary, was such as to potentially cause Means to dislike the defendant and to seek

retribution, if not restitution. Moreover, Means's statement contained far more than the simple identification of the defendant, but was a lengthy narrative from a person with failing memory of conversations and events that had occurred approximately eight months in the past. Means's testimony was used to establish what work was agreed to, how much money defendant had requested for the work, and what was said during the negotiations. Even if one assumes that Means would not have misstated facts intentionally, there was no particular reason to believe that eight months after the fact his recollection of events was accurate in all respects and that cross-examination might not have corrected or clarified important details in his testimony. Indeed, both his admitted dementia and the confusion that he displayed at certain times during the course of his interview confirm the reality of these concerns. The circumstances thus provide nothing comparable to the assurance of reliability that underlies traditional hearsay exceptions.

Means's statement was not spontaneous or made contemporaneously to the crimes. It was a lengthy narrative produced by a district attorney interview approximately eight months after the crimes occurred, in anticipation of a criminal prosecution. The videotape was obviously made to preserve the testimony of an increasingly infirm elderly victim. The Penal Code has long contained provisions for the examination of witnesses conditionally when it appears that a material witness "is so sick or infirm as to afford reasonable grounds for apprehension that he will be unable to attend trial." (Pen. Code, §§ 1336, 1335.) The defendant must be fully informed of his right to counsel (Pen. Code, § 1335) and be given notice and the right to be present in person and with counsel (Pen. Code, § 1340). Penal Code section 1336 was amended in 2000 to provide for the conditional examination of a witness over the age of 70. (*Id.*, subd. (a).) The legislative history of the 2000 amendment explains, "The prosecution of elder abuse cases is often hampered by the inability of an elder adult to either remember an incident or the elder adult's rapidly changing health. A conditional examination (an examination based on videotaped testimony with court verification) preserves a witness's testimony for a trial that often occurs months, or even years later. Often, victims of elder abuse are competent and otherwise able to testify at the time they report an incident of abuse. By

the time the trial approaches, however, the victim's health can rapidly decline and with it, their ability to remember and communicate facts. There is no provision to apply for a conditional examination once the victim's condition begins to deteriorate. The net effect is that these cases cannot be prosecuted and must be dismissed." (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 1891 (1999-2000 Reg. Sess.) as amended June 12, 2000, p. 3.) However, conditional examination is available only "[w]hen a defendant has been charged with a public offense triable in any court." (Pen. Code, § 1335.) Thus, absent legislative expansion of these provisions, it appears at the present time that the only means by which the prosecution may preserve the *testimony* of a witness it fears may be unable to testify at trial or who is over the age of 70 is to commence criminal proceedings and to invoke the provisions for examining the witness conditionally. Section 1380 does not authorize, and the Sixth Amendment prohibits, introducing in a criminal trial a statement of the critical witness against the defendant that lacks any independent assurance of trustworthiness.

Under any standard of review, the erroneous admission of Means's videotaped interview was prejudicial. Absent Means's testimony, there was no evidence that would have permitted the jury to find that defendant made any misstatements to Means.[11]

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[11] The other evidence was as follows. Defendant cashed eight checks drawn on Means's account. They were: (1) dated March 23, 2000, for $1750 with the notation "tree job"; (2) dated March 23, 2000, for $1975 with the notation "material only"; (3) dated March 24, 2000, for $1975 with the notation "for fence job"; (4) dated March 24, 2000, for $975 with the notation "for dumping only"; (5) dated March 24, 2000, for $975 with the notation "material only"; (6) dated March 24, 2000, for $1,975 with the notation "for dumping only"; (7) dated March 26, 2000, for $1,975 with the notation "for fence job"; and (8) dated March 29, 2000, for $2,875 with the notation "for fence only." Richard Meeks, Means's neighbor, testified that in early 2000 he saw two fences being built over a period of four or five days on Means's property. He saw six to eight people working. He also saw some people doing some pruning and yard cleaning, and that they disposed of a green garbage sized contained with camellia and rhododendron clippings. Another neighbor confirmed the building of the fences, the yard work and also testified that the old fence was taken away. The construction expert testified that the newly constructed fences on Means's property were of poor quality and were not constructed with rot resistant materials. Witnesses from the two closest waste disposal sites testified that the $2,950 for dumping costs would have covered approximately 60 tons, or 75 pickup trucks worth of trash. Bernie Sullivan, Means's caretaker, testified that he let defendant into the house on

Although the evidence demonstrated that Means may well have been overcharged for a substantial amount of work, there simply was no other evidence of a false promise. There also was no other evidence that defendant entered Means's house on the particular days charged in the information. Accordingly, defendant's convictions on counts three through six must be reversed.

2. ***Substantial evidence supports defendant's conviction for theft by false pretenses and burglary with respect to the remaining three victims.*** [*]

Defendant contends that the evidence presented at trial was insufficient to support his conviction on each of the theft and burglary counts against three other victims. We review the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*People v. Chardon* (1999) 77 Cal.App.4th 205, 211.)

A. Katherine Stephenson

Defendant was convicted in count one of theft by false pretenses from Katherine Stephenson, and in count two of the burglary of her home on October 5, 1999. He contends that the evidence does not support a finding that he made a misrepresentation or false promise to Stephenson or that he did so with the intent to defraud her. Likewise, he argues that since the evidence is insufficient to support the charge of theft by false pretenses, it is insufficient to sustain the burglary conviction. The jury was instructed correctly that although a number of assertedly false assurances were made, it was required to agree on only one in order to convict. Substantial evidence supports defendant's conviction based on evidence of at least two false statements.

On September 28, 1999, defendant and Stephenson entered into a written contract under which defendant agreed to replace Stephenson's fence and paint her house for $3,250. Stephenson paid defendant in full that same day. The very next day defendant returned to Stephenson's home and told her that the price of top-of-the-line redwood and

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three occasions, but that he did not overhear defendant's conversations with Means, and Sullivan could not remember the dates on which defendant had come to the house.

[*] Part 2 of this opinion is not certified for publication. (See fn., *ante*, p. 1.)

rust-resistant nails for her fence had gone up and that he needed additional money to buy these materials. Stephenson paid him an additional $2,000. On October 5, 1999, defendant returned to Stephenson's house to request still more money to buy paint and supplies to complete the house painting. Stephenson gave defendant a check for $4,625 that bore the notation "painting, fence in full." The prosecution's construction expert testified that the fence was not constructed out of the promised materials. The fence rails were made of untreated construction-grade fir, which is not rot resistant, and the fence posts were made of pressure treated fir, which is resistant to rot but not the same quality as top-of-the-line redwood. He testified that the nails used on the fence were already rusting because they had not been galvanized. Based on the expert's testimony, a reasonable estimate for the cost of properly building the fence with the promised materials is $1,309.75. The expert also testified that the painting was of "very poor quality." In addition to other defects, there were numerous areas that were not painted. The expert originally estimated that the total cost of properly painting the house would have been $2,760, including $2,200 in labor, $200 for materials, and $360 in profit. He adjusted his estimate by an additional $80 to account for a second coat of paint.

Based on this evidence, the jury could reasonably conclude that defendant had misrepresented his intention to use top quality materials and that the reason he needed additional payment was that the price of materials had risen in the preceding 24 hours. From this evidence, the jury also could infer that when defendant initially entered the agreement to replace the fence and paint the house, he had no intention of doing so for $3,250, and that defendant intentionally defrauded Stephenson of the additional amounts he secured from her.

B. James and Rebecca Cason

Defendant was convicted in count eight of theft by false pretenses against James and Rebecca Cason, and in counts eleven and twelve of the burglary of their home on December 1 and 2, 2000. The Attorney General argues that defendant made several misrepresentations to the Casons that were sufficient to support his conviction. First, that defendant falsely told Mr. Cason he needed $5,000 up front to get a good deal on the

windows for his home, but that he did not order the windows. Second, that defendant recommended that the Casons replace their windows with vinyl windows and falsely represented that vinyl windows were more costly than metal windows. Finally, that defendant made the Casons' believe that he had already ordered the windows and that they would be delivered soon when he had not yet ordered the windows. Substantial evidence supports defendant's conviction based upon the second asserted false promise.

The Casons were involved with defendant for only about four days before they withdrew from their contract with him. On Thursday, November 29, 2000, defendant knocked on the Casons' door and asked if they wanted to have their windows replaced. Mr. Cason had been looking for someone to replace the windows and agreed to hire defendant. The following day, defendant returned with a contract for Mr. Cason to sign. The contract required defendant to replace 30 windows for a total cost of $28,850. At that time, defendant's work crew took measurements of the Casons' windows, and Mr. Cason gave defendant a check for $15,000 so that defendant could buy the materials. On the same day, defendant went to the bank to cash the check but was unable to do so because there were not sufficient funds in the Casons' account. Defendant called Mr. Cason, who met defendant at the bank and withdrew $5,000 in cash for defendant. Defendant explained that $5,000 would be sufficient to start but that he would need the other $10,000 soon. The next day, Mr. Cason gave defendant a check for another $5,000. Early the next morning, on December 2, defendant went to Home Depot and requested that a subcontractor come to the Casons' home and measure 13 windows. He paid a $40 deposit for this service. He then went to the Casons' home and explained that he thought the Casons would need vinyl windows because they lived on a windy street, but that the cost for vinyl windows was more than he expected. It is unclear exactly how much more he said the windows would cost. At trial Mr. Cason did not remember the defendant giving him a specific amount, but at the preliminary hearing Mr. Cason testified that the increase would be $10,000. Defendant also explained that the wholesaler would be installing the windows on the main level and that he and his crew would install the windows on the other levels. Mr. Cason wrote defendant a check for $13,000 to cover

the increased cost plus the remainder of the original $15,000 deposit. By the afternoon of December 2, the Casons stopped payment on the $13,000 check and told defendant they did not want to complete the contract.

No one disputes that vinyl windows were an appropriate choice for the Casons' home. The Attorney General argues, however, that the evidence demonstrated that vinyl windows were not significantly more expensive than metal windows. The construction expert testified that there was "not necessarily" a difference in price between the two types of windows, and that although he was not certain what the cost difference was, he did not "believe there's a major difference." The expert also testified that he estimated the cost of vinyl windows at $360 each and that replacing 30 windows in the Casons' house with new vinyl windows should cost approximately $19,320—approximately $10,800 in materials and $8,500 in labor. While the expert did acknowledge that this estimate might increase depending on how much restoration of the original windowsills was necessary to install the new windows, there is no evidence in the record indicating how much restoration work was needed. Based on this evidence, the jury could reasonably have concluded that the original $28,000 estimate was high, and that defendant's request for an additional $10,000 for vinyl windows was fraudulent. Accordingly, substantial evidence supports defendant's conviction of counts eight, eleven, and twelve.

We also reject defendant's contention that he should not have been convicted of two counts of burglary of the Casons' home because both entries were part of a single criminal plan made with a single criminal intent to defraud the Casons over a short period of time.[12] Defendant's reliance on *People v. Bailey* (1961) 55 Cal.2d 514, is misplaced. In *Bailey*, the court held that where as part of a single plan a defendant makes false representations and receives various sums from the victim, the receipts may be cumulated to constitute but one offense of grand theft. (*Id.* at pp. 518-519.) The court stated that the

[12] Although defendant was convicted of two counts of burglary, he was sentenced on only one of the burglaries. His sentence on the other count was stayed pursuant to Penal Code section 654.

test for "determining if there were separate offenses or one offense is whether the evidence discloses one general intent or separate and distinct intents. . . . [¶] Whether a series of wrongful acts constitutes a single offense or multiple offenses depends upon the facts of each case, and a defendant may be properly convicted upon separate counts charging grand theft from the same person if the evidence shows that the offenses are separate and distinct and were not committed pursuant to one intention, one general impulse, and one plan." (*Id*. at p. 519.) Consistent with *Bailey*, defendant was charged with only one count of theft by false pretenses for each victim.

A number of courts have held that the *Bailey* test is not applicable to multiple burglaries committed within a short time span. (*People v. Washington* (1996) 50 Cal.App.4th 568, 575; *In re William S.* (1989) 208 Cal.App.3d 313, 317.) In *William S.*, the court concluded that *Bailey* does not apply to the offense of burglary. "Although thefts were involved here, to be sure, burglary is a considerably different offense. The gist of burglary is the entry into a structure with felonious intent. Technically at least, a new burglary occurs with every new entry." (208 Cal.App.3d at p. 317.) Likewise, in *Washington,* the court held that "the difference between theft and burglary makes application of the *Bailey* rule inappropriate. . . . Although in many cases the goal of a burglary is theft, burglary occurs regardless of whether a theft is accomplished or even attempted. More importantly, the conduct described and proscribed by section 459 is a single act: entry." (50 Cal.App.4th at p. 577.) The court also noted that application of the *Bailey* rule to burglary cases "also ignores that the proscription against residential burglary is designed not so much to deter trespass and the intended crime but to prevent risk of physical harm to others that arises upon the unauthorized entry itself." (50 Cal.App.4th at p. 577.) Each time defendant entered the Casons' home, he did so with the intent to commit a felony. With each entry, he created a separate risk of physical as well as financial harm to the Casons.[13]

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[13] Although there is no testimony from either of the Casons that they felt physically threatened by defendant, Marla Holmes, one of Stephenson's caretakers, testified that defendant's demeanor

C. George Andrade

Defendant was convicted in count thirteen of theft by false pretenses against George Andrade. He contends there is no evidence supporting the jury's finding of a false promise. The Attorney General relies primarily on evidence demonstrating that Andrade gave defendant a number of checks totaling $29,450 for unidentified work, and that numerous duplicate checks appear to have been written for work already paid for. Based on this evidence the Attorney General argues that the jury reasonably could have concluded that defendant misrepresented that Andrade had not yet been paid for the work. In addition, the Attorney General argues that defendant falsely represented to Andrade that he had repaired a failing retaining wall in his back yard.

The evidence demonstrates that defendant misrepresented the work that he had performed and received substantial sums for work that was not completed. For example, on June 6 and 8, 2000, Andrade wrote defendant two checks, one for $1,750 and the other for $3,775, both of which contained the notation "fix wall." Andrade also wrote a check to defendant on June 8, 2000, for $7,875 with the notation "fence job complete." While Andrade's testimony regarding the specific work he had asked defendant to perform in that area of his yard was very confused, he did testify that defendant was to build a fence that would correct a leaning retaining wall in his backyard. With respect to the second check for $3,775, Andrade testified that defendant had told him he had done additional work on the wall, specifically he had "straighten[ed] it out up against the fence." The expert testified, however, that no work was done on the retaining wall itself, and that the fence would do nothing to prevent the wall from leaning. When asked about the purpose of the fence, the expert answered that it was just camouflage so one would not see the wall itself. The expert also estimated that proper repair of the wall, including removing the new fence and taking down the old retaining wall, excavating some of the dirt behind the wall and rebuilding the wall, would cost approximately $5,000. Based on this

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changed after he had done some work for Stephenson and that he was "a little more aggressive . . . more straightforward, a little bit more bass in his voice. The man wanted his money."

evidence, the jury reasonably could have concluded that defendant misrepresented to Andrade the work that he had performed.

3. ***Prosecutorial Misconduct: Improper Closing Argument*** [*]

Defendant contends that the prosecutor misled the jury into believing defendant could be convicted based upon the invalid legal theory that defendant grossly overcharged the victims for his work. He suggests that the prosecutor's argument "created the impression that evidence of overcharging could substitute for evidence of actual misrepresentations lost to the complainants' impaired memories." Defendant's argument fails for a number of reasons.

First, by failing to make a timely objection and request an admonition to cure any harm, defendant has waived his misconduct claim. (*People v. Frye* (1998) 18 Cal.4th 894, 969-970.) In any event, he has failed to establish misconduct on the merits under the appropriate standard of review. "To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we 'do not lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements. [Citation.]" (*Id*. at p. 970.)

Defendant objects to the following portion of the closing argument relating to Ms. Stephenson: "He just flat gouged her, period . . . . [¶] . . . Burglary as instructed is entry into a residence with the intent to commit theft. This money is stolen, ladies and gentlemen, just plain and simple. There is nothing in evidence to support the work had been paid for, that she was under pressure, she didn't think the work was going to get done unless he got his, for lack of a better term. He had the hammer over her and when he walked into that house feeling good because he knew the money was there and took that money, stole that money and committed a crime in addition to the elder financial abuse of first degree burglary here. Because I can corroborate his presence in the house.

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[*] Part 3 of this opinion is not certified for publication. (See fn., *ante*, p. 1.)

This money was stolen. $4,625 is half again the cost of the original contract which got jacked up, as I said. His intent was to take her all the way down the line with the façade of this little bit of work to justify the money that he unlawfully took." Although this portion of the argument can be read to suggest that defendant was liable because he overcharged Stephenson, it can also be reasonably understood to mean that he is guilty because he charged her for work he did not perform and misrepresented the cost and value of his services. Consistent with this interpretation, the prosecutor argued just prior to these statements, "He never intended to honor this agreement in the first place. It had no meaning. It was just a way of getting his foot in the door and this enabled him to leverage his way into this lady's pocketbook to do substandard work and get the money and get out. Gone. The materials didn't go up a thousand dollars the next day." Likewise the prosecutor made clear with respect to defendant's work on Stephenson's house, "This is what they contracted to do on September 28, 1999. [¶] If things stop here, even given the poor quality of the workmanship involved, we are not going to pursue this. It's what takes place that turns this into a crime and shows that at the time he did this he had no intention of fulfilling this obligation to her." Accordingly, there is no reason to believe that the jury would misunderstand the prosecutor's remarks to mean that evidence of overcharging could substitute for evidence of actual misrepresentations.

The same can be said of the prosecutor's argument with respect to Mr. Andrade. Defendant objects to the following argument: "[T]he latex used on the bricks, the work was worth $368. The materials—very small amount of money, less that $50. [¶] [$]13,850. [$]13,850 for $300 worth of work." These comments relate to the value of the work performed on Andrade's chimney. The prosecutor also argued, however, "I want you to focus right here because I believe you have enough right here with all you have with Mr. Andrade to find some false pretenses. . . . [¶] . . . These checks stand for what they mean. You have checks that are for repairs, you have checks that are—that are gifts, you have checks that are loans and you have checks that are vague." The prosecutor then proceeded to detail the work that the checks purported to pay for and the work that was actually done. The prosecutor did not suggest that the overcharge was a

sufficient basis to convict, but that the jury could infer based on the amount charged for the work and the amount or work actually performed, that defendant had made misrepresentations about the work.

Defendant's reliance on *People v. Green* (1980) 27 Cal.3d 1, and *People v. Harris* (1994) 9 Cal.4th 407, is misplaced. *Green* and *Harris* both address instructions that permitted the jury to convict defendant on improper legal grounds. (*People v. Green, supra*, at p. 71; *People v. Harris, supra*, at p. 419.) Here, the jury was properly instructed on the elements of the charged offenses

4. ***Instructional Error*** [*]

Defendant contends that the trial court erred by instructing the jury that it could not consider evidence of the elderly victims' diminished capacity for any purpose other than the victims' reliance on representations defendant may have made.[14] Defendant argues that this instruction vitiated CALJIC No. 2.20[15] and was an impermissible prosecution-oriented pinpoint instruction under *People v. Wright* (1988) 45 Cal.3d 1126. This instruction, however, was drafted by and given at the request of defense counsel. The record demonstrates that defense counsel made a tactical decision to request this instruction so that the jury would not believe defendant was on trial "for taking advantage of old people in a noncriminal way." Accordingly, any asserted error was invited by

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[*] Part 4 of this opinion is not certified for publication. (See fn., *ante*, p. 1.)

[14] The court instructed the jury, "You have heard evidence that some of the witnesses had diminished mental capacity. You are to consider the evidence only as it relates to the question of whether they relied on any promise or representations you may find that Mr. Watson made. You are to consider this evidence for no other purpose."

[15] CALJIC No. 2.20 as given to the jury read, "In determining the believability of a witness you may consider anything that has a tendency reasonably to prove or disprove the truthfulness of the testimony of the witness, including but not limited to any of the following: [¶] The extent of the opportunity or ability of the witness to see or hear or otherwise become aware of any matter about which the witness testified; [¶] The ability of the witness to remember or to communicate any matter about which the witness has testified; [¶] The character and quality of that testimony; [¶] The demeanor and manner of the witness while testifying . . . ."

defendant and provides no ground for appeal. (*People v. Wader* (1993) 5 Cal.4th 610, 657-658.)

Moreover, defense counsel did not provide ineffective assistance by requesting the instruction. To prevail on a claim of ineffective assistance, defendant must show that there was no rational tactical purpose for counsel's act and that it is reasonably probable that absent counsel's deficiencies, a more favorable result would have been obtained. (*Strickland v. Washington* (1984) 466 U.S. 668, 690, 694.) Here, defense counsel expressed a reasonable basis for the requested instruction. The purpose was to lessen the chance that defendant would be found guilty for taking advantage of the elderly victims in a noncriminal manner. This decision was entirely reasonable. Contrary to defendant's assertion, it is highly unlikely that the jury would have misinterpreted the instruction as prohibiting its ability to weigh the reliability and credibility of the witnesses. Accordingly, defendant has not established his claim of ineffective assistance of counsel.

5. ***Motion to Sever*** [*]

Defendant contends that the trial court abused its discretion in denying his motion to sever the charges that related to each of the four victims. Defendant acknowledges that the charges were proper for joinder under Penal Code section 954, in that all were of the "same class."[16] (*People v. Polk* (1964) 61 Cal.2d 217, 230.) He argues, however, that "the cases were not cross-admissible against each other, and that joinder of four not-very-strong cases, each one of which was individually defensible, . . . prejudice[d] [him] by

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[*] Part 5 of this opinion is not certified for publication. (See fn., *ante*, p. 1.)

[16] Penal Code section 954 reads in relevant part, "An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated. The prosecution is not required to elect between the different offenses or counts set forth in the accusatory pleading, but the defendant may be convicted of any number of the offenses charged, and each offense of which the defendant is convicted must be stated in the verdict or the finding of the court; provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately."

fostering the inference that [defendant] was a shady operator disposed to fleecing vulnerable old people by doing shoddy and overpriced home repairs."

Where the statutory requirements for joinder are met, the trial court need sever only on a showing of prejudice by the defendant. (*People v. Marquez* (1992) 1 Cal.4th 553, 572.) " ' "The burden is on the party seeking severance to clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried." [Citation.] [¶] "The determination of prejudice is necessarily dependent on the particular circumstances of each individual case, but certain criteria have emerged to provide guidance in ruling upon and reviewing a motion to sever trial." [Citation.] Refusal to sever may be an abuse of discretion where: (1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; (3) a "weak" case has been joined with a "strong" case, or with another "weak" case, so that the "spillover" effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges; and (4) any one of the charges carries the death penalty or joinder of them turns the matter into a capital case.' " (*People v. Bradford* (1997) 15 Cal.4th 1229, 1315.)

Here, the trial court ruled that the evidence admitted with respect to each victim was to be considered separately and was not admissible against the other defendants. That alone, however, is insufficient to establish prejudice. The California Supreme Court has " 'made clear on several occasions that cross-admissibility is not the sine qua non of joint trials.' [Citations.] While we have held that cross- admissibility ordinarily dispels any inference of prejudice, we have never held that the absence of cross-admissibility, by itself, sufficed to demonstrate prejudice." (*People v. Mason* (1991) 52 Cal.3d 909, 934.) The trial court instructed the jury at the beginning and end of the trial that, "There are four separate complaints in this case and thus in effect four separate cases being heard together. The evidence concerning each case is distinct. You are to consider the evidence for each case only as it relates to that case. You must not consider the evidence from one case in relation to any of the other three cases." When the jury submitted a note to the court during deliberations asking, "Can we use evidence of the defendant's

behavior with respect to one complainant as circumstantial evidence of how he behaved with respect to other complainants," the trial court responded, "No. See instructions." There is no indication in the record that the jury did not follow these instructions.

We reject defendant's argument that by joining relatively weak cases together, "the jury was able to draw on the strengths of one to fill the gaps in the others." There was substantial evidence, both oral and written, demonstrating defendant's fraudulent promises to each of the victims. The jury demonstrated its ability to consider the evidence applicable to each count separately by finding defendant not guilty on one of three counts relating to the burglaries of the Casons' home. Accordingly, we are not persuaded that defendant carried his burden of demonstrating prejudice from the trial court's refusal to sever.

DISPOSITION

The judgment is reversed with respect to counts three through six. Defendant was sentenced to two years eight months in state prison on count four, to run consecutively to the principal term imposed on count two, and his sentence on counts three, five and six was stayed pursuant to Penal Code section 654. Accordingly, the judgment is modified to strike the sentence on count four, reducing the sentence by two years eight months to 21 years eight months. In all other respects, the judgment is affirmed.

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Pollak, J.

We concur:

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McGuiness, P. J.

_____
Corrigan, J.

Superior Court of Alameda County, No. 141237, Julie Conger, Judge.

COUNSEL

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